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KEALI'I S. LOPEZ
DIRECTOR

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

AND THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Monday, March12, 2012
2:10 p.m.

TESTIMONY IN SUPPORT OF SB2429 SD2: RELATING TO FORECLOSURES

TO THE HONORABLE ROBERT HERKES AND GILBERT S.C. KEITH-AGARAN, CHAIRS, AND MEMBERS OF THEIR COMMITTEES:

The Department of Commerce and Consumer Affairs (the "Department") appreciates the opportunity to testify in support of SB2429 SD2. My name is Everett Kaneshige, I am the chairperson of the Mortgage Foreclosure Task Force ("MFTF") and am also testifying on behalf of the Department.

The SD2 under consideration by the Committees addresses concerns from community associations regarding issues arising from enabling community association nonjudicial foreclosures using language borrowed from condominium association law. It also repeals Part I nonjudicial foreclosures (HRS §667-5), which necessitated adjusting the timeline of the Mortgage Foreclosure Dispute Resolution ("MFDR") Program so that

it would not greatly extend the amount of time needed to complete a Part II nonjudicial foreclosure (HRS §667-22). This was done by creating an exemption within the stay that goes into effect when participation in the MFDR Program is elected by an owner-occupant (SB 2429 SD2, Section 48). The other issue addressed by the SD2 was the possibility of electronic publication of notices of public sale arising from foreclosures in order to reduce the cost of publication, which is passed on to the foreclosed mortgagor. The Department assisted in providing the enabling language, which was inserted into Section 22 of the SD2, by adding a new subsection (2) to subsection (d) of HRS §667-27, as well as additional amendments to related parts of Part II to accommodate the change.

In addition to the above, the Department has identified the following potential issues for which it would like to propose amendments for the Committees' consideration:

1. In light of the deletion of Part I, the public information statement drafted by the MFTF is no longer accurate. Specifically, in Section 27, 667-41(b), under "STEP FOUR: DISBURSEMENTS OF PROCEEDS; POTENTIAL DEFICIENCY JUDGEMENT" the following amendment to the SD2 should be made (additions double-underlined, deletions bracketed and stricken):

"In a NONJUDICIAL FORECLOSURE, the Mortgagee distributes the proceeds from the sale. [**If the mortgaged property does not sell for enough to pay off the balance due under your loan, the Mortgagee may have the right to file a lawsuit against you to collect the deficiency. In many cases, after a nonjudicial**

foreclosure, a Mortgagee cannot or will not choose to file a lawsuit for a deficiency.] Unless the debt is secured by other collateral, or except as otherwise provided by the law, the recordation of both the conveyance document and affidavit shall operate as full satisfaction of the debt."

The original text had to account for the ability of a foreclosing mortgagee to pursue a deficiency under Part I, in the event that an owner-occupant had a fee simple or leasehold ownership interest in any other real property. As HRS §667-38 does not permit deficiencies unless the debt is secured by other collateral, the statement as originally drafted would not adequately describe the law.

2. Section 38 of the SD2 is an MFTF amendment that aims to enable the Department to contract with housing counselors and budget and credit counselors to provide services to the consumers participating in the MFDR Program. When it was drafted, an inadvertent error was made wherein the Department was allowed to contract with "private organizations or approved housing counselors or approved budget and credit counselors..." (emphasis added). The "or" should have been "and", as "or" implies that the Department may contract with a private organization, or an approved housing counselor, but not both. Therefore the following amendment to the SD2 is requested (additions double-underlined, deletions bracketed and stricken):

"(c) The department is authorized to contract with county, state, or federal agencies, and with private organizations,[**or**] approved housing counselors, and [**or**] approved budget and credit counselors for the performance of any of the functions of this part. These contracts shall not be subject to chapter 103D or 103F."

3. There is an inconsistency in drafting in section 46, 667-81(d) of the SD2. In order to conform the sentence "If the agreement provides for foreclosure, the parties shall memorialize the agreement in a writing signed by both parties..." to a prior amendment made to 667-81(c) of the same section of the SD2, it should be amended to read "memorialize the agreement in writing, signed by both parties...".

4. The SD1 made an amendment to an Unfair Deceptive Act or Practice ("UDAP") clause related to the operation of the MFDR Program. This clause, prior to the SD1, was located in HRS §667-76(b), and pertains to the timely filing of a lender's foreclosure notice with the Department. It was moved, in the SD1, to Section 35, as a new subsection in 667-60(a)(13). This clause is absolutely necessary to the operation of the MFDR Program, such that if subsequent amendments are made to other parts of §667-60, it is critical that Section 35, 667-60(a)(13), should be preserved as is. That being said, the language of Section 35 conforms to the recommendations of the MFTF, and as such it represents the compromise between consumers, lenders, and title insurance stakeholders, therefore it is recommended that Section 35 of the SD2 should remain unamended.

Thank you for this opportunity to testify in support of SB 2429 SD2. The Department recommends that it be passed, with amendments per the comments above. I will be happy to answer any questions that the Chairpersons or members of the Committees may have.

NEIL ABERCROMBIE
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KEALI'I S. LOPEZ
DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

AND

THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Monday, March 12, 2012
2:10 p.m.

TESTIMONY ON SENATE BILL NO. 2429, S.D. 2, RELATING TO FORECLOSURES.

TO THE HONORABLE ROBERT N. HERKES AND GILBERT S.C. KEITH-AGARAN, CHAIRS,
AND TO THE HONORABLE RYAN I. YAMANE AND KARL RHOADS, VICE CHAIRS, AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs appreciates the opportunity to testify on S.B. No. 2429, S.D. 2, Relating to Foreclosures. My name is Bruce Kim, Executive Director of the Office of Consumer Protection ("OCP"). OCP supports the intent of the bill and offers the following comments in support of the proposition that the two-year limit on recorded association liens should not be taken out of the bill.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("MFTF") pursuant to Act 162. The Task Force met over the course of the past two years and submitted separate reports to the Legislature. The reports covered many of the issues surrounding the foreclosure crisis affecting the State and proposed legislation addressing this complex subject. The first report led to the adoption of Act 48 which sought to reform the foreclosure process and enact significant consumer protections especially in the area of nonjudicial foreclosures. This year the Task Force through its various working groups devoted a significant amount of time and effort in attempting to strengthen Act 48. Ultimately, the Task Force's working groups came up with a number of recommendations intended to provide clarity and certainty to lenders, borrowers and associations in the foreclosure process.

One of the three MFTF working groups this year worked on incorporating non-judicial foreclosures for associations into Chap. 667. Among the final recommendations of the MFTF was to include a two-year limit on **recorded** association liens under Chaps. 421J, 514A and 514B. This provision was unanimously approved by the MFTF and the MFTF rejected proposals advocating even longer expiration periods for association liens.

An element of the condominium association lobby has objected to the MFTF's two-year limitation on **recorded** association liens for various reasons. However, these objections should be considered in light of the following facts:

1. The MFTF approved adoption of identical lien and collection language for

Chap. 421J associations which have been in effect for Chaps. 514A and 514B associations for many years.

> The task force recommends adding two new sections to chapter 421J, on planned community associations, to provide these associations with the same options as condominium associations with regard to association liens for assessments (modeled after sections 514A-90 and 514B-146) and the collection of unpaid assessments from tenants or rental agents (modeled after sections 514A-90.5 and 514B-145).

Comment 2, Final Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2012, at 18.

2. Under the MFTF's lien and collection provision for 421J, Chaps. 421J, 514A, and 514B associations would now have identical **automatic lien** rights which arise without any requirement that the lien be recorded. These **automatic liens** have priority over "all other liens" except for a) tax liens; and b) mortgages that were recorded prior to the recordation of a notice of a lien by the association. *See* H.R.S. § 514b-146(a). The MFTF's two-year expiration limit applies only to "**recorded**" liens, not to automatic liens which are not recorded. However, if an association chose to record its lien then the **recorded** lien would expire after two years.

3. Under Secs. 514A-90, 514B-146, and the MFTF's proposed lien and collection provision for 421J, Chaps. 421J, 514A, and 514B associations do not have to record their lien in order to foreclose on the delinquent unit owner.

> The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property.

H.R.S. § 514B-146(a).

There is no waiting period. Under the automatic lien provisions of 514A-90 and 514B-146, associations can foreclose on their liens from dollar one whether they are recorded or not. Under the MFTF's proposal the automatic lien would be there whether the lien is recorded or not and, if the lien is recorded, even after the two year period has run. The arguments against the two-year lien expiration for **recorded** liens are illusory.

4. According to a review of other state condominium laws, at least 33 states plus the District of Columbia place similar time limits on association liens. These include Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, North Carolina, Nebraska, New Hampshire, Nevada, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, West Virginia and Wisconsin.

It is not anti-consumer to require associations to timely initiate collection efforts on delinquent association assessments in fairness to the other unit owners in the association and to the individual who is delinquent. It is also not anti-consumer to require that a **recorded** association lien expire by law after two years if the lien has been paid or is no longer under collection by the association.

If the association's recorded lien automatically expires after two years, then there is absolutely no need for a unit owner to file and engage in expensive and protracted litigation to obtain the release of the association's recorded the lien under the current

provisions of § 421J-C. *See* § 421J-C, SB 2429, SD 2 at 15-18. The current two-year expiration language eliminates the need to obtain a release of the recorded lien through litigation under § 421J-C or having the association and unit owner incur unnecessary attorneys' fees and costs to release the recorded lien. HB 1875 HD 2 contains no corresponding provision establishing a separate litigation process to remove a recorded lien because the recorded lien automatically expires in two years under the House bill. § 421J-C should be eliminated.

OCP worked with Sen. Hee's Judiciary Committee staff to add additional language to the two-year recorded lien language which would extend the life of the recorded lien if proceedings to enforce the lien were instituted within the two-year period.

> A lien recorded by the association shall expire two years from the date of recordation unless proceedings to enforce the lien have been instituted within that time period; . . .

Unfortunately, there was not enough time to include this change in the version of S.D. 2 before the committee today.

Thank you for allowing me to testify on this matter. I would be happy to answer any questions the committee may have.

My name is John Morris. I was a member of the Mortgage Foreclosure Task Force and was on the condominium and homeowner association workgroup of the task force during 2011. I have practiced condominium association law for over 23 years and have personally represented condominium and homeowner associations in hundreds of nonjudicial foreclosures. I was also the State's first condominium specialist at the DCCA from 1988-1991, where I gained a perspective on owner concerns. I would like to suggest the changes in the attached.

The first set of changes merely relate to the fact that, despite best efforts, the word "mortgagor" or "mortgaged property" seems to have crept into the association version of the nonjudicial foreclosure provisions in SB 2429 SD2. For clarity and consistency, it would be good to make those corrections.

The second set of changes relate to the no-personal-service provisions of the bill. On further reflection, it seems that the provisions should be clarified as indicated. One problem is that section 667M creates a conflict. The second problem is the section about net rental proceeds in 667-B seems to suggest that only one month's worth of net rental proceeds have to be deducted from the owner's delinquency, when, in fact, it should be the <u>total</u> amount of net rental proceeds during the life of the rental of the unit.

Thank you for the opportunity to testify

John Morris

SB 2429 SD2 SUGGESTED CLARIFICATIONS

Note: These changes: 1) clarify how an owner can redeem the owner's property; and 2) state that the ***total*** *net rental proceeds collected by the association, not just the net rent proceeds for one month, must be deducted from the owner's delinquency.*

§667-B Notice of default and intention to foreclose; contents; distribution; alternative remedies for failure to serve.

* * *

(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner or any other party listed in subsection (e)(2) to (5) within sixty days, the association may:

(1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting;

(2) Proceed with a nonjudicial foreclosure of the unit; provided that if the association proceeds without the permission of the court, the association shall not be entitled to obtain a deficiency judgment against the unit owner, and the unit owner shall have one year from the date the association records the deed in the nonjudicial foreclosure to redeem the unit [redacted]; or

(3) Take control of the unit if the unit is unoccupied, after giving notice to the unit owner at the unit owner's last known address as shown on the records of the association or as determined by the association as part of its due diligence to serve notice to the owner. The association's authority to take control of the unit pursuant to this paragraph shall be exercised solely for the purpose of renting the unit to generate rental income to pay the unit owner's delinquency, and the association shall acquire no legal title to the unit. In addition, the association shall credit the net rental proceeds generated from the rental of the unit to the owner's delinquency. For purposes of this paragraph, "net rental proceeds" means the rental proceeds remaining each month after deducting:

(A) The unit's regular monthly assessments that come due while the association controls the unit pursuant to this subsection;

(B) Any rental agent commissions; and

(C) Expenses incurred by the association in maintaining the unit in rentable condition.

If the unit owner pays the full amount of the unit owner's delinquency to the association, the association shall return control of the unit to the unit owner; provided that the full amount of the [redacted] owner's delinquency shall be calculated by deducting the [redacted] net rental proceeds [redacted], if any, from the [redacted] owner's delinquency.

§667-M Recordation; full satisfaction of debt by borrower. [redacted] recordation of both the conveyance document and the affidavit shall not operate as full satisfaction of the debt owed by the unit owner to the association unless the sale proceeds from the unit or the amounts paid by a purchaser under the special assessment permitted by section 421J-A or 514B-146 are sufficient to satisfy the unit owner's debt to the association, including the association's legal fees and costs. The debts of other lien creditors are unaffected except as provided in this part.

SB 2429 SD2 SUGGESTED CORRECTIONS RE REPLACEMENT OF TERM "MORTGAGOR" WITH "UNIT OWNER"

§667-F Public notice of public sale; contents; distribution; publication.

* * *

(d) The association shall have the public notice of the public sale:

(1) Printed in not less than seven-point font and published in the classified section of a newspaper of general circulation in the real property tax zone in which the unit is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao which shall be considered its own geographic area for the purposes of this paragraph. For the purposes of this paragraph, a newspaper is of general circulation if the newspaper:

(A) Contains news of a general nature; and

(B) Is distributed within the county where the [redacted] is located:

§667-K Affidavit after public sale; contents.

* * *

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

(1) I am duly authorized to represent or act on behalf of _____ (name of association) ("association") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part , Hawaii Revised Statutes);

(2) The association is a "association" as defined in the power of sale foreclosure law;

(3) The power of sale foreclosure is of an association lien. If the lien was recorded, the lien was dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The unit is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the property, including the certificate of title or transfer certificate of title number if registered with the land court, is attached as Exhibit "A";

(4) Pursuant to the power of sale provision of law or association documents, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:

(A) A notice of default and intention to foreclose was served on the [redacted] and the following person: _____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;

§667-L Recordation of affidavit, conveyance document; effect.

* * *

(b) When both the affidavit and the conveyance document are recorded:

(1) The sale of the unit is considered completed;

(2) All persons claiming by, through, or under the [redacted] and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law;

(3) The lien of the association and all liens junior in priority to the lien of a association shall be automatically extinguished from the unit; and

(4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

(c) The [redacted] and any person claiming by, through, or under the [redacted] and who is remaining in possession of the unit after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejectment. The purchaser may bring an action in the nature of summary possession under chapter 666, ejectment, or trespass or may bring any other appropriate action in a court where the unit is located to obtain a writ of possession, a writ of assistance, or any other relief. In any such action, the court shall award the prevailing party its reasonable attorneys' fees and costs and all other reasonable fees and costs, all of which are to be paid for by the non-prevailing party.

HAWAII FINANCIAL SERVICES ASSOCIATION

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March 12, 2012

Rep. Robert N. Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Gilbert S.C. Keith-Agaran, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 2429, SD 2 (Foreclosures)**
Hearing Date/Time: Monday, March 12, 2012, 2:10 p.m.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA **opposes this Bill as drafted.**

The purposes of this Bill are to: (a) implement the 2011 recommendations of the Mortgage Foreclosure Task Force, and other best practices, to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner association liens and the collection of unpaid assessments; (b) repeal the non-judicial foreclosure process under Part I of HRS Chapter 667; (c) make permanent the mortgage foreclosure dispute resolution program and the process for converting non-judicial foreclosures of residential property into judicial foreclosures; (d) repeal the provision excluding participants of the dispute resolution program from converting non-judicial foreclosure proceedings to judicial actions; and (e) delete language requiring open houses of foreclosed condominium and community association units and make conforming amendments.

1. Background.

I served as the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force") from 2010 to the present. I was a member of the Task Force as the designee of the HFSA. This testimony is not on behalf of the Task Force and it is not in my capacity as the Vice Chair of the Task Force.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its Preliminary Report to the 2011 Legislature. As indicated in the Final Report to the 2012 Legislature, there were various issues on which the 18 Task Force members were divided. These issues are detailed in the "minority reports", which are attached to the Final Report, for the HFSA, the Hawaii Bankers Association, and the Hawaii Credit Union League.

The testimony of the HFSA on this Bill includes some of the concerns raised in those three "minority reports" about some of the Task Force's recommendations.

This HFSA testimony also incorporates by reference the testimony which we understand is being submitted by the Hawaii Bankers Association and the Hawaii Credit Union League detailing the reasons for concerns about various provisions in this Bill.

2. Proposed revisions to this Bill.

This Bill should be revised as follows:

1. Do not repeal the non-judicial foreclosure process under Part I of HRS Chapter 667. The Task Force did not recommend the repeal. The Part I non-judicial foreclosure process was already enhanced by consumer protection provisions in Act 48 (2011). At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures.

The provisions for Part I non-judicial foreclosures are in HRS Secs. 667-5 through 667-15. Sections 51 through Section 57 of this Bill, which are on page 154 through page 163, would repeal those HRS sections for Part I non-judicial foreclosures.

We ask that you: (a) delete Sections 51 through 57, and (b) delete any provisions in this Bill which would repeal references to specific HRS sections for Part I non-judicial foreclosures, such as references to HRS Sec. 667-5.

2. Repeal HRS Sec. 667-60 and do not put in the changes to HRS Sec. 667-60 in Section 35 of this Bill on pages 130 through 133. One of the changes to HRS Sec. 667-60(b) and (c) would allow a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

3. Undo the repeal of the provision in HRS Sec. 667-53(c) in Section 28 (page 120 of this Bill) which excludes participants of the Mortgage Foreclosure Dispute Resolution program from converting non-judicial foreclosure proceedings to judicial actions. The Task Force did not recommend the repeal. Such a repeal would mean that an owner-occupant could first require the lender to go through a Mortgage Foreclosure Dispute Resolution program session, and once the session is concluded, that owner-occupant could convert the foreclosure from a non-judicial process to a judicial process. The negative consequences of the repeal would be to unreasonably extend the foreclosure process and unnecessarily increase the cost of foreclosures.

In this regard, we ask that you:

(a) Reinstate HRS Sec. 667-53(c);

(b) For HRS Sec. 667–53(a)(1), delete the additional wording in subparagraph (B) on page 118, lines 7 through 9; and

(c) For HRS Sec. 667-55, delete the additional wording on page 123, lines 11 through 15.

4. Amend this Bill to change the current practice of publishing notices of foreclosure sales (auctions) for non-judicial and judicial foreclosures. These notices are currently required to be published once each week for three successive weeks in advance of the auction in "daily" newspapers of general circulation. Because a major "daily" newspaper is charging thousands of dollars for these advertisements, these expenses unreasonably increase the cost of non-judicial and judicial foreclosures.

To change the publication requirement for notices, we ask that you:

(a) Allow notices of non-judicial foreclosure public sales or auctions ("auctions") under Part I of HRS Chapter 667 to be published either (i) in a newspaper that is at least

"weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs ("DCCA"); and

(b) Allow notices of judicial foreclosure auctions by court-appointed commissioners to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the DCCA. Note that while portions of Part I deal with judicial foreclosures (e.g. HRS Sec. 667-1), the requirement of where notices are published is not specified in Part I but is instead in court orders. Putting in the publication requirement for judicial foreclosures in Part I will ensure consistency.

The two alternatives, i.e. in newspapers which are at least weekly or on a government website, are identical to what is in this Bill for notices in Part II non-judicial foreclosures. See the changes on page 102 to HRS Sec. 667-27(d) in Section 22 of this Bill.

5. Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h) on page 73 and page 78, respectively. This cap is on the total amount of unpaid common area maintenance fees that a condominium association can specifically assess against a person who purchases a foreclosed unit. The amount of the cap is temporarily a maximum $7,200 based on 12 months of delinquent maintenance fees. (On September 30, 2014, the cap is set to return to $3,600 based on 6 months of delinquent maintenance fees.)

Even though this Bill at least reduces the 12 month period to 6 months, it neverthelss removes any dollar amount on the cap. The lack of a reasonable monetary cap could make it difficult for consumers to obtain mortgage financing for condominium units in certain projects.

We ask that you leave in the "defective" effective date in this Bill to ensure further discussion.

3. House version of this Bill.

The House version of this Bill is House Bill 1875, H.D. 2 (referred to as "the House Bill"). The House Bill is similar in many respects to this Senate Bill. However, there are various substantive differences.

If you are inclined to replace the contents of this Senate Bill with the contents of the House Bill, we ask that you make the following changes to the House Bill before it is inserted into this Senate Bill as a House Draft 1:

1. Do not repeal the non-judicial foreclosure process under Part I of HRS Chapter 667. At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures. See the discussion above.

2. Remove the proposed new HRS section in Section 3 of the House Bill beginning on page 45, line 1, and continuing through page 47, line 6. Additionally, in Section 67 of the House Bill, delete the first proviso on page 157, on lines 13 and 14. These provisions would mandate that when the Mortgage Foreclosure Dispute Resolution program expires on September 30, 2014, there would be at least 21 foreclosure violations specified as unfair or deceptive acts or practices, there would be a laundry list of at least 17 types of violations that could void a title transfer of property which is foreclosed non-judicially, and there would be a 180 day time limit for filing actions to void the title transfers of a non-judicially foreclosed property.

These changes should be deleted because the repeal of HRS 667-60 (unfair or deceptive act or practice) in Section 62 of this Bill (page 154, lines 17 through 22) should not be dependent on whether there is a Mortgage Foreclosure Dispute Resolution program. Additionally,

this proposed new section in Section 3 of the House Bill would permit a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

3. Delete the requirement in Part II of HRS Chapter 667 for staging "open houses" or "public showings" prior to the public sale (auction) in non-judicial mortgage foreclosures. The provisions to be deleted in Part II are in HRS Secs. 677-21, 667-22, 667-26, 667-27, and 667-32.

It should be noted that the non-judicial foreclosure process being proposed for condominium associations and planned community associations in the latest version of both the Senate Bill and the House Bill does not have such an open house requirement even though that requirement was in the original version of each of these Bills. It would be consistent to delete this same open house requirement in Part II for mortgage foreclosures. The deletion is needed because of the anticipated legal problems with trying to obtain access to the property to conduct open houses and because of the potential liability connected with such open house showings.

4. Delete the attorney affirmation provision for judicial foreclosures beginning on page 47, line 7, through page 49, line 15 in the House Bill. When the House Bill was heard by the House Finance Committee on February 29, 2012, the Hawaii State Bar Association submitted testimony expressing concerns about this provision because of attorney-client privilege issues and confidentiality issues. Existing court rules, such as the Hawaii Rules of Civil Procedure and the Hawaii Supreme Court's Rules of Professional Conduct governing attorneys, already provide enforcement remedies for problems that this attorney affirmation provision purports to address.

5. Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h). See the discussion above.

6. Enable notices of public sales (auctions) in non-judicial foreclosures and judicial foreclosures to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs. See the discussion above.

7. Keep a "defective" effective date in this Senate Bill to ensure further discussion.

Thank you for considering our testimony.

Marvin S. C. Dang

MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

Testimony for SB2429 on 3/12/2012 2:10:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Sunday, March 11, 2012 9:38 PM

To: CPCtestimony

Cc: gomem67@hotmail.com

Testimony for CPC/JUD 3/12/2012 2:10:00 PM SB2429

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Eric M. matsumoto
Organization: Mililani Town Association (MTA)
E-mail: gomem67@hotmail.com
Submitted on: 3/11/2012

Comments:
While there are other provisions that need to be revised, we strongly oppose this measure as written based on the significant cost driving ptovisions for PCAs as follows:

1. The two year lien expiration for MTA will result in increasing the foreclosure rate from approximately 1.5% to approximately 10% based on the approximately 100 foreclosures currently in-process, and approximately 1200 delinquencies. This results in an increased cost of approximately $480,000 as a minimum resulting from 1200 x $400 (cost per lien filing only). The total cost to implement the 2 year lien expiration would realistically be much higher moving to foreclosure. Furhter, for MTA, the provisions would require us to place a lien on $102 (dues amount collected on a quarterly basis)or $204 for 6 months of delinquency. This means we spend $400 minimum just to get to the lien phase in order to collect $204. I would guess a similar scenario would be expected in other PCAs. Is this what is intended for homeowner associaitns to do as a reasonable course of action by its directors? The question is why push this agenda; just to have PCAs cast in the same mold with AOAOs when the dollar value of delinquencies vary significantly between PCAs and AOAOs? As such, the lien expiration should be removed. Alternatively, increase the lien expiration to 5 years where it would make a lot more sense. And if another alternative is needed, remove PCAs completely from the measure to allow more time to develop reasonable provisions that wsould be viewed as a win-win for those involved in foreclosure actions in PCAs.

And by the way, if we entered into a payment plan with a delinquent homeowner and the homeowner later defaults on the payment plan, with the 2 year lien expiration, we could concievely have much less than the 2 years to complete the foreclosure, and MTA and all its homeowners would lose not only the dollars due from the homeowner but more importanlty the ability to refile the lien. This gives added credence to the options cited above.

2. The second cost driver issue is the provision that precludes PCAs from foreclosing for fines, penalties, legal fees and late fees on Page 4, Lines 12 - 14, PART II, SECTION 2, 421J-A(a). We are currently experiencing situations where delinquent homeowners pay the assessments but are not paying the attorneys fees and late fees. This provision permits avoidance of these kinds of payments that would result in significant loss to PCAs. Accordingly, this provisin should be removed.

The two cited cost driving issues result in a bill that is effectively anti-consumer for PCAs and their homeowners, and should be held or revised so as not to create unintended financial burdens.

Hawaii Credit Union League
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Testimony to the House Committee on Consumer Protection and Commerce and
House Committee on Judiciary
Monday, March 12, 2012

Testimony in opposition to SB 2429 SD2, Relating to Foreclosures

To: The Honorable Robert Herkes, Chair
The Honorable Ryan Yamane, Vice-Chair
The Honorable Gil Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice-Chair
Members of the Committees

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 81 Hawaii credit unions, representing approximately 811,000 credit union members across the state. We are in opposition to SB 2429 SD2, Relating to Foreclosures.

While we understand the current economic situation, and the plight of homeowners today, we oppose this measure. We recognize and appreciate the efforts of the legislature to amend Act 48 to address some concerns raised by lenders, however, this bill continues to present many significant concerns for Hawaii's credit unions, and the lending market as a whole. We have listed these concerns below.

1. The League opposes the repeal of nonjudicial foreclosures under Part I, (under sections 49 – 55 of SB 2429, SD 1). The Task Force split evenly on (and accordingly did not adopt) the motion that the Task Force recommend to the Legislature that "mortgagees [lenders] be allowed to continue to have the option to initiate non-judicial foreclosure actions under § 667-5 [Part I of HRS Chapter 667] when the moratorium in Act 48 (in Section 40) ends on July 1, 2012." The Part I non-judicial foreclosure process should continue to exist as a viable alternative to the Part II non-judicial foreclosure process now that Act 48 strengthened consumer protections in Part I. Act 48 now (a) requires that Part I foreclosure notices be served at least 21 days before the auction date, (b) specifies that the service of the notice be in the same manner as serving civil complaints, (c) enables an owner-occupant to convert a Part I non-judicial foreclosure to a judicial foreclosure or to elect dispute resolution under certain circumstances, and (d) prohibits a lender in a Part I non-judicial foreclosure from pursuing a deficiency against certain owner-occupants. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor-owned property, if not for owner-occupied residential property.

2. The League opposes the proposed repeal of the sunset provisions in Act 48. While Hawaii is faced with a unique situation involving residential mortgage foreclosures that is

without precedent in its history, there is no reason to believe that these circumstances will persist for any substantial period. The radical and untested changes to Hawaii's foreclosure laws made in Act 48 should sunset so that there is an impetus to further review the need to continue them.

3. Because of the increasing costs being charged by certain newspapers of daily circulation in Hawaii to print the notices of judicial and non-judicial foreclosure auctions required to be "published", the League supports the Legislature's efforts to have a state agency provide a centralized internet website for the official posting of notices required by Chapter 667.

4. **§§ 514A-90 and 514B-146**: The League opposes the lifting of the cap on an association's super-lien for maintenance fees. It was originally capped at the lesser of 6 months of $3,200. Under Act 48, that cap lifted to the lesser of 12 months or $7,200. Now, the super-lien is simply six months of monthly assessments with no monetary cap. This cost will eventually be borne by the next private buyer of the unit, and will effectively depress prices for units in the project.

5. **§ 667-41**: While the League agrees that the proposed amendment of § 667-41 is a tremendous improvement, the section still potentially applies to certain commercial loans in which residential property is taken as collateral. The League believes that the Legislature did not intend this informational notice to apply to commercial borrowers and applicants. The League asks that the Legislature, in addition to adopting the revisions proposed by the Task Force, also amend § 667-41 to specify that such notice requirement apply only to consumer, residential mortgage loans.

6. **§667-53(c)**: The League opposes the proposed repeal of §667-53(c), the effect of which is to give a mortgagor the opportunity to first go through the mortgage foreclosure dispute resolution process, and then convert the nonjudicial foreclosure to a judicial foreclosure.

7. **§667-56**: Prohibited practices: The League seeks repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale.

(b) Section 667-56(6) also uses the phrase "bona fide loan modification negotiations." This phrase is vague, and raises many questions, such as: If a mortgagor has been denied a loan modification, can the mortgagor then reapply time after time and maintain the mortgagor's status as "pending" bona fide loan modification negotiations? Does the time reset with each mortgage loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. Section 667-56(7) presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

8. **§667-58**: As worded, § 667-58(a) implies credit unions must file affiliate statements naming their own officers. The League suggests § 667-58(a) be amended to begin as follows:

> "Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or an officer of the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . ."

9. **§667-59**: The League suggests that this section, captioned, "Actions and Communications with the Mortgagor in Connection with a Foreclosure," should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made in writing by its agents, including but not limited to its . . . ."

10. **§ 667-60**: The League submits that the proposed amendment of § 667-60 is too complex and overly broad. Section 667-60 now states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." The requirement that a claimant must show a court proof that an act was "unfair and deceptive" is removed. Any violation of Chapter 667, no matter how miniscule, becomes an unfair and deceptive act or practice entitling the claimant to certain remedies and damages, and that includes voiding of the contract or agreement. Section 667-60 is often cited as one of the principal reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. Section 667-60 should be repealed.

The League submits that the proposed amendment would continue to discourage lenders from foreclosing non-judicially. It is also unnecessary. Every lender is already subject to potential liability under §480-2 where someone has evidence sufficient to convince a court that a violation occurred.

11. **§ 667-80**: The League believes that § 667-80 should be amended to permit mainland lenders to attend dispute resolution sessions during reasonable business hours where they are situated. In addition, provisions must be made to accommodate situations where a lenders agreement to a loan modification requires more than one other approval. For example, in instances where mortgage insurance is in place, the insurer usually has the right to approve the modification in addition to the lender.

12. **§ 667-85**: The League submits that § 667-85 should be repealed. In part, this section reads:

> "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program. "

A neutral in the Mortgage Foreclosure Dispute Resolution Program should be immune from liability but should not be privileged from testifying where, for example, the neutral may make findings or determinations which subject a lender or a borrower to sanctions.

In addition to the concerns listed above, we also concur with the issues raised by the Hawaii Bankers Association and the Hawaii Financial Services Association. Thank you for the opportunity to testify.

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The Honorable Robert N. Herkes, Chair
The Honorable Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection & Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice-Chair
House Committee on Judiciary

Hearing : Monday, March 12, 2012, 2:10 p.m.
State Capitol, Conference Room 325

In support of SB 2429, SD2 Relating to Foreclosures

Chairs, Vice-Chairs, and Members of the Committees:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("Legal Aid"). I am advocating for our clients who include the working poor, seniors, citizens who speak English as a second language, the disabled, low and moderate income families who are consumers, and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in Legal Aid's Consumer Unit. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, back taxes, and other consumer debt problems.

We are testifying **in support** of SB 2429, SD2 as it would strengthen protections for mortgage consumers in the State of Hawai'i. Legal Aid supports the intent of the Mortgage Foreclosure Task Force ("Task Force") recommendations to make Act 48 and Hawai'i's foreclosure law more efficient and effective. We support in particular the amendment in § 667-60 of SB 2429, SD 2, which limits lender liability for unfair and deceptive acts and practices under § 480-2, HRS, to serious, listed violations only, as recommended by the Task Force. As stated in our prior testimony, this recommendation was approved by 13 of the 17 voting Task

Force members in direct response to lenders' stated concerns regarding potential liability for minor chapter 667 violations.

We also support the provisions of SB 2429, SD2 which seek to (1) implement the recommendations of the Task Force, including the repeal of Part of Chapter 667, HRS; (2) make permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures; and (3) repeal the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions.

Conclusion:

For the above reasons, we respectfully request passage of SB 2429. SD2. We appreciate the committee's recognition of the need to protect consumers in the State of Hawai'i and support SB 2429, SD2's attempts at doing so. Thank you for the opportunity to testify.

Hawaii Bankers Association

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Presentation to the Committees on Consumer Protection & Commerce
And Judiciary
Monday, March 12, 2012 at 2:10 p.m.
Testimony on SB 2429, SD2 Relating to Foreclosures

In Opposition

TO: Honorable Robert N. Herkes and Gilbert S.C. Keith-Agaran, Chairs
Honorable Ryan I. Yamane and Karl Rhoads, Vice Chairs
Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to SB 2429, SD2. HBA is the trade organization that represents FDIC insured depository institutions operating branches in Hawaii.

While we appreciate the efforts of all members of the Mortgage Foreclosure Task Force and remain sympathetic to those homeowners who are experiencing hardship due to inappropriate behavior by, and difficulty communicating with, their mainland lenders, we respectfully oppose this bill.

We recognize that steps were taken to address lenders' concerns, such as narrowing the scope of potential violations related to Unfair and Deceptive Acts or Practices. However, although modest improvements were incorporated into the Task Force recommendations, the recommendations and other added provisions still make Act 48 unworkable.

Several issues that need to be reconsidered include:

- Allowing borrowers to go through Dispute Resolution and then subsequently converting to a judicial foreclosure should they not like the outcome of the DR process. This extends the process and increases costs. Instead of using the Dispute Resolution process with the possibility of then going through the judicial foreclosure process, mortgagees will likely continue to use the judicial process.

- The dispute resolution program should sunset as scheduled on September 30, 2014.

- Allowing the filing of an action to void the foreclosure sale for up to six months after the sale is recorded. This will chill public bidding by third-parties and is unwarranted, overly broad and unnecessary.

- Language specifying the application of rent collected by an Association of Apartment Owners should be included in the bill. It is anticipated due to the extended period of time for a mortgagee to foreclose, Associations will likely be able to collect rent to cover its delinquent maintenance fees and other costs, therefore, any excess rental income received by the

association from the unit should be paid to existing lienors based on priority of lien, and not on a pro rata basis.

- Removing the "cap" on the dollar amount on delinquent maintenance fees will likely lead to the unintended consequence of making it more difficult for first-time and middle-income homebuyers to qualify for a loan since it will require more money to complete the purchase.

  This provision is especially damaging to Hawaii borrowers because if the unit is a condominium, the buyer at foreclosure will have to pay the delinquent maintenance fees, and the potential for this liability will inherently be borne by future borrowers. It also makes it more difficult for the condo owner to sell.

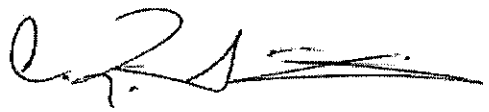
- Repealing of nonjudicial foreclosures under Part I, Section 51 of SB 2429, SD1. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor owned property.

All of the above proposals serve to discourage lenders from utilizing the non-judicial process. We must not lose sight of the fact that funds used to provide mortgages to borrowers come from banks' depositors. As depository institutions, banks have a fiduciary responsibility and obligation to all our depositors that the funds entrusted to us is preserved for future return. What the legislature is proposing no longer serves as a streamlined and fair method of foreclosure for lenders to seek fulfillment of their loan contracts.

Last year, we cautioned that Act 48 would likely result in unintended consequences. Almost immediately upon its passage, Fannie Mae and Freddie Mac issued mandates to lenders to stop all non-judicial foreclosures and switch to the judicial process. Absent any appropriate and immediate remedy, it was evident that our court system would become overburdened and an already lengthy foreclosure process would grow even longer. Additional delays in removing the backlog of foreclosures only prolong a return to a healthy housing market and Hawaii's economic recovery.

The Hawaii Credit Union League, Hawaii Financial Services Association and Hawaii Bankers Association "minority reports" contained in the Task Force report outline additional issues that need to be addressed in the non-judicial foreclosure law. A summary of those combined reports is attached.

Thank you for the opportunity to provide our testimony.



Gary Y. Fujitani
Executive Director

Attachment

Attachment

Summary of Lenders' Issues on Task Force Bill

1. **§667-56 Prohibited conduct:** Repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale. Item (5) attempts to give a potential short sale that is agreed to at or around the time of the non-judicial foreclosure sale priority over the foreclosure so long as the sales price is at least 5% greater than the foreclosure sale price. Recognizing that a sales commission of 6% on the short sale would wipe out the entire 5% increased sales price, the Task Force agreed to increase this percentage to at least 10%. However, this does not address other conditions in the short sale that might have prevented the lender from approving the short sale in the first place, such as payment of other debts of the seller that effectively reduce the amount of the payoff to the lender. This effectively places unsecured creditors ahead of the foreclosing lender and other lien holders

(b) Section 667-56(6) also uses the vague phrase "bona fide loan modification negotiations." If a mortgagor has been denied a loan modification, can the mortgagor then reapply seriatim and maintain the mortgagor's status as pending bona fide loan modification negotiations? Does the time reset each time a mortgagor submits a loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. This section presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

Section 667-60 must be amended to provide clarity to these items and allow the foreclosing lender to end negotiations at some point.

2. **§667-58 Valid notice; affiliate statement**: (a) As worded, the subsection implies mortgagee/lender must file affiliate statements naming their own officers. A suggested amendment to begin as follows:

> Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . .

3. **§667-59 Actions and communications with the mortgagor in connection with a foreclosure**: Besides the obvious proof problems and violation of the parol evidence rule, this section is directly counter to the express stated provisions in virtually all notes and mortgages which require any revision to the existing terms to be in writing. This section should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made **in writing** by its agents, including but not limited to its . . . ."

4. **§667-60 Unfair or deceptive act or practice; transfer of title**: The Task Force attempted to correct one of the more problematic provisions in Act 48 Sec. 667-60 states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." It unnecessarily subjects lenders to the liabilities in HRS Sec. 480-2 for even immaterial and nonsubstantive violations of HRS Chapter 667 (Mortgage Foreclosures). HRS Sec. 667-60 has been cited as one of the reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. This section should be repealed.

Instead, the Task Force recommended that Sec. 667-60 be changed to: (a) create a "laundry list" of 21 violations which would be unfair or deceptive acts or practices (including 7 items in Sec. 667-56 and 4 items related to the Mortgage Foreclosure Dispute Resolution Program), (b) create 17 violations which could result in a non-judicial foreclosure sale being voided, and (c) allow actions to void the foreclosure sale to be filed up to 6 months after an affidavit of the sale is recorded. This recommendation is arguably unwarranted and overly broad. Lenders likely will continue not to use non-judicially foreclosure process and consequently not use the dispute resolution program.

5. **§667-85 Neutral qualifications; status and liability**: Reads in part: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program." This sentence should be repealed. A neutral in the Mortgage Foreclosure Dispute Resolution Program should not be immune from testifying if the neutral makes findings or determinations which subject a lender or a borrower to sanctions.

6. **§667-80 Parties; requirements; process**: This section should be amended to permit mainland lenders to attend during reasonable business hours where they are situated. Additionally, provision must be made to accommodate situations where approval of a loan modification requires more than one approval. For example, in instances where mortgage insurance is in place, the insurer will be required to approve the modification in addition to the lender.

7. **§667-41 Public information notice requirement**: While improved tremendously by the proposed amendment approved by the Task Force, this section still potentially applies to certain commercial loans in which residential property is taken as collateral. It is doubtful that the Legislature intended this informational notice to apply to commercial borrowers and applicants and requests that the Legislature, in addition to adopting the proposed revisions made the Task Force, also enact a further amendment to specify that such notice requirement applies only to consumer, residential mortgage loans.

HAWAII CHAPTER
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March 11, 2012

Honorable Robert N. Herkes
Commerce and Consumer Protection
Honorable Gilbert S.C. Keith-Agaran
Committee on Judiciary
415 South Beretania Street
Honolulu, Hawaii 96813

Re: S.B. 2429, S.D.2

Dear Chair Herkes, Chair Keith-Agaran and Committee Members:

I have been appointed by the CAI Legislative Action Committee (CAI) to provide *comments and alternative language* to *three areas* of S.B. 2429, S.D.2.

CAI supports the Task Force's efforts and hard work in attempting to address concerns of various parties affected by the newly evolving nonjudicial foreclosure law. However, as we all know, condominiums (Chapter 514A and Chapter 514B, HRS entities) and community associations (Chapter 421J, HRS entities) are *made up of consumers – and CAI acts as their advocate for purposes of the suggested language contained herein.*

Our comments are in no way an attempt to ignore the work of others, like the Consumer Protector and other interest groups. We all have the same goal – *to keep maintenance fees and costs down for our owners (the consumers).* Associations can only raise maintenance fees to generate more money to meet the needs of the condominiums and communities, there are no other options.

Please keep these points and goals in mind when considering CAI's proposed revisions to certain portions of S.B. 2429, S.D.2 (*attached hereto*), and summarized as follows:

1. ***Expiration of Association Liens will cost consumers more in the end.***

    a. This is problematic, especially for Chapter 421J, HRS, Associations that only charge a fraction of the assessments that Chapter 514A & Chapter 514B, HRS Associations charge.

b. Chapter 421J, HRS, associations may only have a lien for $300 in total after 2 years. There is no reason for the lien to expire for this amount.

c. *Our suggested language (attached)* – seeks to delete this expiration altogether, OR only have it apply to condo associations – *i.e.*, Chapter 514A and Chapter 514B, HRS, projects.

2. ***Stopping any Foreclosures Related to Fines, Penalties, Legal or Late Fees Will Result in Paying Consumers Having to Carry Debtors that Only Pay Their Maintenance Fees – and Simply Dispute these Other Lawful Charges.***

   a. The unintended consequence of the current language will result in paying consumers/owners having to "carry" debtors or delinquent owners that do not have to "first pay" and then dispute their debts later.

   b. *Our suggested language (attached)* – seeks to delete this altogether, OR prevent associations from seeking a nonjudicial foreclosure if the owner has paid maintenance fees but has not paid any other charges. Associations could still proceed with court action and a judicial foreclosure for such non-payments.

3. ***Clarifying the "service" of the Notice of Default and Intent to Foreclose to save costs to owners, and defining the debtor's or delinquent owner's "redemption right" to avoid confusion.***

   a. "Serving" the Notice of Default and Intent to Foreclose should only be required regarding the owner, and "delivery" of the Notice and Intent to Foreclose should be required for anyone else on title.

   b. This simple change will result in a cost savings for consumer/owners. (*See attached language.)*

   c. Our additional suggested revisions – defined "attempts at service" on the owner; and defined further what would have to be paid for a delinquent owner to "redeem" their unit or apartment. (*See attached.)*

Thank you for your time and consideration, and if you have any questions, please feel free to contact me at cporter@HawaiiLegal.com, (direct line) 539-1114, or (cell number) 542-6603).

Very truly yours,

Christian P. Porter

A. Expiration of Liens (3 Options to the Current Lanugage in S.B. No. 2429 S.D.2).

- Current Language being Proposed for Chapter 421J, HRS, Associations (*Page 4, Lines 7-8*):
    - "A lien recorded by the association shall expire two years from the date of recordation."
- Current Language being Proposed for Chapter 514A & 514B, HRS, Associations (*Page 70, Lines 17-18; and Page 75 Lines 15-16, respectively*):
    - ". . . provided that a lien recorded by the association of apartment owners shall expire two years from the date of recordation."
- **Option #1** – *Delete* this language as to Chapter 421J, 514A & 514B, HRS, Associations.
- **Option #2** – *Delete* this language on Page 4, Lines 7-8 only as to Chapter 421J, HRS Associations
- **Option #3** – *Alternative language* to clarify that this does not affect automatic liens arising from Association's governing documents:
    - "A lien recorded by the association shall expire two years from the date of recordation; however, this will in no way effect the association's automatic lien that arises pursuant to law or the association's governing documents."
    - ". . . provided that a lien recorded by the association shall expire two years from the date of recordation unless renewed by the association prior to the expiration of the lien; however, this will in no way effect the association's automatic lien that arises pursuant to law or the association's governing documents."

B. <u>Foreclosing on lien arising from fines, penalties, legal fees, or late fees (2 Options to the Current Lanugage in S.B. No. 2429 S.D.2).</u>

- <u>Current Language being Proposed for Chapter 421J, HRS, Associations</u> (*Page 4, Lines 12-14*):
    - ". . . provided that no association may foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."
- <u>Current Language being Proposed for Chapter 514A & 514B, HRS, Associations</u> (*Page 71, Lines 3-5; and Pages 75-76, lines 21-22 and line 1, respectively*):
    - ". . . provided that no association of apartment owners may foreclose a lien against any apartment that arises solely from fines, penalties, legal fees, or late fees."
    - ". . . provided that no association of apartment owners may foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."
- **<u>Option #1</u>** – *Delete* this language.
- **<u>Option #2</u>** – *<u>Alternative language</u>* to clarify that this only applies to non-judicial or power of sale foreclosures, but would allow judicial foreclosures as monitored by the Courts:
    - ". . . provided that no association may ~~foreclose~~ <u>exercise the nonjudicial or power of sale remedies provided in chapter 667 to foreclose</u> a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."

C. **Clarifying (1) "service" of the Notice of Default, and Intent to Foreclose, and (2) definition of "redemption rights".**

Suggested revisions to the pages indicated in S.B. No. 2429, S.D.2:

- **(Page 35, lines 18-22; and Page 36, lines 1-7)**

(e) The association shall have the notice of default and intention to foreclose served on the owner and delivered to the following:

(1) ~~The unit owner;~~

~~(2)~~ Any prior or junior creditors who have a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;

(32) The state director of taxation;

(43) The director of finance of the county where the unit is located; and

(~~5~~4) Any other person entitled to receive notice under section 667-5.5.

- **(Page 36, lines 8-22)**

(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner after having an authorized process server attempt on three separate occasions (not on the same day) to serve the notice of default and intent to foreclose on the owner at unit address, ~~or any other party listed in subsection (e) (2) to (5)~~ within sixty days, the association may:

(1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting at the unit address;

(2) Proceed with a nonjudicial foreclosure of the unit; provided that if the association proceeds without the permission of the court, the association shall not be entitled to obtain a deficiency judgment against the unit owner, and the unit owner shall have ~~one year~~six months from the date the association records the deed in the nonjudicial foreclosure to redeem

he unit by paying to the association all outstanding amounts that are owed including, but not limited to, all assessments, special assessments, late fees, late charges, interest, fines, penalties, attorneys' fees and costs, and any other amounts that may be chargeable to that unit; or

- **(Page 37, lines 1-21)**

(3) Take control of the unit if the unit is unoccupied, after giving notice to the unit owner at the unit owner's last known address as shown on the records of the association or as determined by the association as part of its due diligence to serve notice to the owner. The association's authority to take control of the unit pursuant to this paragraph shall be exercised solely for the purpose of renting the unit to generate rental income to pay the unit owner's delinquency, and the association shall acquire no legal title to the unit. In addition, the association shall credit the net rental proceeds generated from the rental of the unit to the owner's delinquency. For purposes of this paragraph, "net rental proceeds" means the rental proceeds remaining each month after deducting:

(A) The unit's regular monthly assessments that come due while the association controls the unit pursuant to this subsection;

(B) Any rental agent commissions; and

(C) Expenses incurred by the association in maintaining the unit in rentable condition.

- **Page 38, lines 1-7**

If the unit owner pays the full amount of the unit owner's delinquency (including, but not limited to, all assessments, special assessments, late fees, late charges, interest, fines, penalties, attorneys' fees and costs and any other amounts that may be chargeable to that unit) to the association, the association shall return control of the unit to the unit owner; provided that the full amount of the owner's delinquency shall be calculated by deducting the net rental proceeds, if any, from the owner's delinquency.

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March 12, 2012

The Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: S.B. 2429, S.D.2, Relating to Foreclosures

HEARING: Monday, March 12, 2012, at 2:10 p.m.

Aloha Chair Herkes, Chair Keith-Agaran, and Members of the Committees:

I am Myoung Oh, Government Affairs Director, testifying on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **submits comments and requests a proposed amendment** for S.B. 2429, S.D.2, which implements the recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner associations.

HAR sincerely appreciates the efforts of the Mortgage Foreclosure Task Force to make recommendations regarding the existing foreclosure law in Hawai'i. However, the HAR has concerns that some of these recommendations may create unintended adverse consequences if it becomes law.

Moratorium on Non-Judicial Foreclosures
HAR understands that, since the enactment of Act 48, non-judicial foreclosures have essentially stopped, and lien holders have opted to pursue the more costly and lengthy judicial foreclosure route. This issue appears to be linked, in part to the stringent Unfair or Deceptive Acts and Practices (UDAP) provisions in Act 48. The mortgage industry and even Fannie Mae have cited UDAP as one of the primary reasons for noncompliance with the legislative intent of Act 48. Until certain UDAP provisions that apply to non-judicial foreclosures are clarified, HAR believes that it may be prudent to continue a moratorium on Part I and even Part II non-judicial foreclosures.

HAR believes that non-judicial foreclosures should exist as a mechanism only if it is fair and balanced for both the borrower and creditor. HAR believes that, in the meantime, court oversight via the judicial foreclosure process should continue to be utilized as the only foreclosure mechanism and be only limited to owner-occupants.

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Foreclosure Recovery for Homeowner Associations
HAR strongly supports the expansion of the condominium foreclosure law to cover planned community associations so that planned community associations are able to obtain relief due to unpaid common assessments as a form of recovery from foreclosure. Moreover, HAR supports the concept of a new section to establish an alternate power of sale process for homeowner and condominium associations for unpaid liens and assessments. We recognize that this section may need refining, and defer to the appropriate parties on specifics.

HRS Section 667-60 – Oppose 180-Day Waiting Period (Section 35, Page 133)
Under Section 35, Page 133 of S.B. 2429, S.D.2, the Task Force recommends that a 180-day waiting period be implemented after a foreclosure sale, to allow the foreclosed borrower to bring forth any claims for invalidating the public auction sale. HAR has concerns that the imposition of the 180-day requirement would severely impact the ability of a bidder to be able to purchase foreclosed real estate at auction. This will discourage potential bidding from the public at large, because, among other reasons, the waiting period will make it challenging to obtain financing. Owner occupant financing usually contains a requirement that a buyer take occupancy of the property within 30-90 days of closing the loan/purchase. If a Buyer cannot occupy a property within the lender's guidelines, the loan is categorized as an "investor loan," which requires a much larger down payment and a higher interest rate.

The California civil code sections regarding bona fide purchaser protections have worked for many years and could provide guidance for this Committee to consider. In California, the law presumes that the lender has satisfied requirements relating to notification, the auction sale, and all other aspects of the foreclosure. The lender is liable for financial damages to the mortgagor if the sale is overturned, but the third-party bidder is protected. In short, the California system encourages competitive bidding at the auction, fosters competition that will yield the highest possible sale price, and creates the opportunity for the homeowner who lost the property to recover funds in the event there is an overbid.

Based on the foregoing, if the Committee is inclined to move this bill forward for further discussion, HAR would recommend that the 180-day waiting period only apply in situations where the lender takes back the property at auction with a credit bid, but that a third-party purchaser be exempted from this requirement.

For the forgoing reasons, HAR respectfully ask this Committee to consider the attached amendments to protect third-party purchasers, while still preserving consumer protection for homeowners.

Mahalo for the opportunity to testify.

§667-60 Unfair or deceptive act or practice; transfer of title. (a) Any foreclosing mortgagee who engages in any of the following violations of this chapter shall have committed an unfair or deceptive act or practice under section 480-2:

(1) Failing to provide a borrower or mortgagor with, or failing to serve as required, the information required by sections 667-5, 667-22, or 667-55;

(2) Failing to publish, or to post, information on the mortgaged property, as required by sections 667-5, 667-27, or 667-28;

(3) Failing to take any action required by section 667-24 if the default is cured or an agreement is reached;

(4) Engaging in conduct prohibited under section 667-56;

(5) Holding a public sale in violation of section 667-25 or section 667-26;

(6) Failing to include in a public notice of public sale the information required by section 667-27 or section 667-28;

(7) Failing to provide the information required by section 667-41;

(8) With regard to mortgage foreclosure dispute resolution under part V:

(A) Failing to provide notice of the availability of dispute resolution as required by section 667-75;

(B) Participating in dispute resolution without authorization to negotiate a loan modification, or without access to a person so authorized, as required by section 667-80(a)(1);

(C) Failing to provide required information or documents as required by section 667-80(c);

(D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;

(9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;

(10) Failing to distribute sale proceeds as required by section 667-31;

(11) Making any false statement in the affidavit of public sale required by section 667-32; and

(12) Attempting to collect a deficiency in violation of section 667-38.

(b) Notwithstanding the provisions of subsection (a), any failure to comply with the provisions of this chapter shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value without notice. The statements in the recorded affidavit required by section 667-5 or section 667-32, as applicable, shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of a bona fide purchaser and encumbrancer for value without notice. The purchaser of the mortgaged property, other than the foreclosing mortgagee, shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include lenders and holders of liens who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly-conveyed property. [~~the~~] A transfer of title to the [~~purchaser of the property~~] foreclosing mortgagee as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in sections (a)(1) to (9)

if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Without limiting the provisions of subsection (b), [~~A~~]any action to void the transfer of title to the purchaser of property under this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than one hundred eighty days following the recording of the affidavit required by section 667-5 or section 667-32, as applicable. If no such action is filed within the one hundred eighty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor.

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March 12, 2012

Via Email: CPCtestimony@Capitol.hawaii.gov and Hand Delivery

Representative Robert N. Herkes
Chair, Committee on Consumer Protection & Commerce
Hawaii State Capitol, Room 320

Representative Gilbert S.C. Keith-Agaran
Chair, Committee on Judiciary
Hawaii State Capitol, Room 302

Re: S.B. 2429, SD2 –Relating to Foreclosures
Hearing Date: Monday, March 12, 20121 at 2:10 p.m.
Conference Room 325

Dear Chair Herkes, Chair Keith-Agaran, and Members of the Consumer Protection & Commerce, and Judiciary Committees:

I am Michael Wong, an attorney with RCO Hawaii LLLC ("RCO"), a law firm dedicated to the representation of the mortgage banking and default servicing industry. Our firm provides a wide range of services in banking and real estate law to more than 200 large and small companies. It also serves as retained counsel for Fannie Mae in Hawaii.

RCO is pleased to **submit comments** regarding S.B. 2429, S.D.2, which implements the recommendations of the Mortgage Foreclosure Task Force, and makes numerous other changes to the Hawaii foreclosure law. RCO specifically supports the intent of the amendments made in S.B. 2429, S.D.2, which change the publication requirements for non-judicial foreclosures to a "newspaper of general circulation" and provide guidelines for qualifying as such a newspaper. This approach, which has been implemented in other states, ensures that a newspaper meets general circulation requirements, and that there is an opportunity for more than one paper to compete to publish non-judicial foreclosure notices. This helps to address the dramatic increase in costs that has occurred for publishing notices as a result of Act 48, Session Laws of Hawaii 2011. RCO believes the amendments proposed in S.B. 2429 S.D.2 are part of the solution to ensure that there is fair competition for the publication of notices.

In addition, RCO appreciates that S.B. 2429 S.D.2 goes one step further and allows for the alternative for notices of public sale to be posted electronically on the DCCA's website. RCO believes that the Internet can and should play a role in improving the foreclosure auction process, particularly by increasing visibility and participation at foreclosure auctions. Specifically, allowing notices of a foreclosure sale to be published electronically will increase bidders and third party sales. These third party sales are beneficial to everyone because the bidder absorbs the foreclosure costs, the borrower might derive income (if the bid exceeds the offset bid), the bank does not have to add a property to its REO portfolio, and the house is back moving in the market.

RCO notes that, in other states, in lieu of a government sponsored website, notices of sale are either allowed or required to concurrently be published in newspapers and qualified online websites. In Alaska, for example, this approach has been used, and a number of newspaper websites and other qualified websites compete to publish foreclosure sale notices online for a minimal cost.

RCO remains willing to engage in further discussion and to provide input on this issue, based upon its experiences in Hawaii and other states. Thank you very much for the opportunity to testify regarding this measure.